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Supreme Court, U.S.
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No. 03-1650

IN THE

Supreme Court of the United States

STEVEN BIENER and CAROL GREENWAY,

Petitioners,

v.

FRANK CALIO, in his official capacity as Delaware Election Commissioner, and The Democratic Party of the State of Delaware,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION OF RESPONDENT DEMOCRATIC PARTY OF THE STATE OF DELAWARE

CHARLES J. DURANTE *
CONNOLLY BOVE LODGE
& HUTZ LLP
P.O. Box 2207
Wilmington, Delaware 19899
(302) 658-9141

* Counsel of Record

Counsel for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Should this Court grant a petition for certiorari to review a decision of the Third Circuit upholding a fee imposed by a political party on all non-indigent candidates for nomination, which fee is limited in amount by state law?

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BRIEF IN OPPOSITION OF RESPONDENT DEMOCRATIC PARTY OF THE STATE OF DELAWARE

COUNTER-STATEMENT OF THE FACTS

Since 1976, Delaware law has required that "major political parties" (those with at least 5 percent of the state's registered voters, Del. Code Ann. tit. 15 § 101(13)(a)) select all of their candidates by a primary. Del. Code Ann. tit. 15 § 3101A. To qualify for the primary ballot, a candidate for nomination must (1) give notice of his or her candidacy on a prescribed form, and (2) pay the fee imposed by the party, Del. Code Ann. tit. 15 § 3106, which may not exceed 1 percent of the salary over the term of office sought. Del. Code Ann. tit. 15 § 3103(b). Any filing fee is tendered by a check,

payable to the party, by the deadline to the appropriate election official, who in turn forwards the check to the political party. Del. Code Ann. tit. 15 § 3106.

So that poverty not be a bar to candidacy, a candidate who meets an objective standard of indigence may qualify for the ballot without paying a fee, upon submitting petitions bearing the signatures of 1 percent of the registered voters in the area to be represented by the candidate. Del. Code Ann. tit. 15 §3103(d). The statute classifies as indigent any person who receives, or is determined by the State Election Commissioner to be eligible to receive, benefits under the Supplemental Security Income (SSI) program of the Social Security System. Del. Code Ann. tit. 15 §3103(e).

Other parties, described as "minor political parties," Del. Code Ann. tit. 15 §101(13)(b), select their candidates by party convention rather than state-run primary. Del. Code Ann. tit. 15 §§ 3101A, 3301(b). The statute does not provide for a filing fee for minor political parties.

Persons not affiliated with a political party may qualify for a position on the ballot by submitting petitions bearing the signatures of 1 percent of the registered voters in the areas to be represented by the candidate. Del. Code Ann. tit. 15 § 3002(b). The statute requires no filing fee for such unaffiliated candidates.

Petitioner Biener sought the Democratic Party's nomination for Delaware's lone seat in the U.S. House of Representatives in 2002. He refused to accept any campaign contributions, made this refusal a central feature of his candidacy, and pledged to spend no more than $1,000 of his own funds during the entire campaign.

Although he was not indigent—during the campaign, he was a member of one of the nation's largest law firms and purchased a residence for $400,000—Petitioner Biener objected to the 1 percent filing fee adopted by the Democratic

Party for all offices, $3,000 for a Congressional candidate, and brought an action in the U.S. District Court of Delaware to avoid payment.

The Petitioner did not claim to be indigent, nor allege that the filing fee was unreasonably large, but rather objected to paying any fee whatsoever, or to raising funds for his campaign to pay the fee.

After the District Court denied the Petitioner's motion for a preliminary injunction, Petitioner Biener paid the filing fee and amended the complaint to request a refund of the filing fee. After further briefing, the District Court granted summary judgment to the Respondents on January 21, 2003.

The Third Circuit affirmed, *Biener v. Calio*, 361 F.3d 206, 217 (3d Cir. 2004), finding the fee to be constitutional under the Qualifications Clause because "there is no avowed purpose to evade the constitution and exclude a class," *Id.* at 212; under the Equal Protection Clause because keeping the ballot manageable is "an interest sufficient to meet the low standard of review," *Id.* at 215; and under the Due Process Clause because "there is no due process violation where, as here, the state limits the private party's discretion and the private party operates within the established limitations." *Id.* at 216.

On June 14, 2004, the Petitioners filed the Petition for Writ of Certiorari in this Court.

SUMMARY OF ARGUMENT

The Third Circuit's decision conflicts with no holding of this Court. No important issue of public policy warrants the Court's attention to this case. No part of the Third Circuit's decision conflicts with the holdings of any other Circuit.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE THIRD CIRCUIT DECISION DOES NOT CONFLICT WITH GOVERNING PRECEDENT OF THIS COURT.

This Court has held that a filing fee is a legitimate device that may be imposed as a condition for candidacy, *Jenness v. Fortson*, 403 U.S. 431, 442 (1971), "to prevent the clogging of its election machinery, avoid voter confusion and assure that the winner is a choice of a majority," as well as to protect the integrity of the political process from frivolous or fraudulent candidacies, *Bullock v. Carter*, 405 U.S. 134, 145 (1972), but any statute providing for a filing fee must permit an alternative method of access to the ballot for a candidate who is indigent. *Lubin v. Panish*, 415 U.S. 709, 718 (1974). The Delaware statute contains alternative access for indigent candidates, by permitting them to perfect their candidacy by nominating petitions, and is therefore consistent with governing precedent of this Court.

II. THERE IS NO IMPORTANT ISSUE OF PUBLIC POLICY THAT WARRANTS GRANTING CERTIORARI IN THIS CASE.

The first sentence of Petitioners' Statement of the Case to the contrary, there is no such thing as "Delaware's $3,000 filing fee for House primary elections." The statute only authorizes the "major political parties"—currently the Democratic and Republican Parties—to assess filing fees from candidates for their nomination. The state's role is merely to conduct the primary when there is more than one candidate for nomination, to receive the candidate's nominating papers, and to receive and transmit to the party the check for the filing fee. The statute does not require all candidates to pay a filing fee to run for Congress. Candidates who seek the

nomination of minor political parties, who are indigent or who are unaffiliated with a political party need pay no filing fee.

When there are multiple candidates for a major party's nomination, the statute requires the nominee to be selected by a primary. The political party may, however, impose a fee on those candidates, except those who are indigent. These fees permit the party to verify the seriousness of its potential nominees, forestall fraudulent candidacies, sift out potential candidates unwilling to support the party's goals, and ascertain the commitment of those who would carry its banner.

Just as the State can impose a filing fee as a threshold test of the bona fides of a perspective candidate who proposes to engage the machinery of the State in a primary election, so also do a political party's well-settled rights of association, *California Democratic Party v. Jones*, 530 U.S. 567 (2000); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986); *Democratic Party of the U.S. v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981); *Cousins v. Wigoda*, 419 U.S. 477 (1975); *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976), permit it to gauge the sincerity of a candidate's intentions, and engage the candidate to support the costs of the party's campaign operations, which necessarily benefit its nominees, by means of a filing fee.

Petitioner Biener seeks to elevate his idiosyncratic campaign platform—of receiving no campaign contributions and spending no more than $1,000 of his own funds—into a constitutional principle. His partiality to the use of nominating petitions is a matter for the legislative branch. That the Delaware legislature has generally shied away from use of petitions is understandable. Nominating petitions spawn contention. They require exhaustive verification by state officials and candidates, leading frequently to litigation over such tedious issues as the validity of signatures, *Appeal of*

Riley, 466 A. 2d 236 (Pa. Comm. 1983), the effect of the sequence of petitioners' filings, *In re Cianfrani*, 359 A. 2d 383 (Pa. Supr. 1976), whether persons have signed their name correctly, *Malinou v. Board of Elections*, 271 A. 2d 798 (R.I. Supr. 1970), or whether petitions must be stapled together. *Petition of Job*, 268 A. 2d 29 (N.J. App. 1970).

Petitions may have their blessings as well. But there is no governing precedent of this Court, nor compelling reason of public policy why states or political parties cannot under the Constitution extract filing fees, regulated in amount by state law, from candidates who are not indigent.

III. THERE IS NO CONFLICT AMONG THE CIRCUITS.

The decision of the Third Circuit conflicts with no decision of any other Circuit Court in any pertinent respect. No decision of any court has held that reasonable filing fees are an impermissible additional "qualification" for office. The Courts agree that reasonable filing fees for candidates for a party's nomination do not violate the Equal Protection Clause if there is an alternative means for an indigent candidate to gain access to the ballot. There is no conflict with the Third Circuit's finding that a State election law, in permitting a political party to set a reasonable, regulated filing fee for its candidates, has not violated the Due Process Clause.

A. There Is No Conflict Concerning The Qualifications Clause.

No court has ever held that a reasonable filing fee constitutes a prohibited additional qualification for office. In so concluding, the Third Circuit joined unanimous authority. *Cassidy v. Willis*, 323 at 602 (Del. 1974); *Fowler v. Adams*, 315 F. Supp. 592 (M.D. Fla. 1970); *Kenneweg v. Allegheny County Commissioners*, 62 A. 249 (Md. Ct. App. 1905).

Morever, as the Third Circuit pointed out, if filing fees were impermissible as a "qualification," nominating petitions would be equally unconstitutional. *Biener v. Calio*, 361 F.3d 206, 214 (3d Cir. 2004).

B. There Is No Conflict Concerning The Equal Protection Clause.

The Petitioners contend the Third Circuit erred in applying a rational basis standard in analyzing their Equal Protection challenge. Yet, the rational basis test was the appropriate level of scrutiny because neither a suspect class nor a fundamental right is implicated.

The Court's review of a statute enacted under a State's Constitutionally-delegated authority to conduct elections is reviewed under a flexible standard of scrutiny, under which, depending on the context, the Court's analysis can range from strict scrutiny to a rational basis. *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

To trigger close scrutiny of a statute under the Equal Protection Clause, a plaintiff must be a member of a protected class or invoke a fundamental right. Concluding that because reasonable filing fees do not curtail substantial voting, associational and expressive rights protected by the First and Fourteenth Amendments, but rather impose a levy on one who concedes he can afford it, the Third Circuit, like the other Circuits which have reviewed the question, concluded that the analysis is less rigid than in cases of invasive or restrictive government action that would invite strict scrutiny. *Fulani v. Krivanek*, 973 F.2d 1539, 1543 (11th Cir. 1992); *Adams v. Askew*, 511 F.2d 700, 703 (5th Cir. 1975). In *Dixon v. Maryland*, 878 F. 2d 776 (4th Cir. 1989), on which the Petitioners rely in search of a conflict, the portion of the statute which the Fourth Circuit found objectionable was the requirement that unaffiliated write-in candidates post a filing

fee. That situation is not presented here, where unaffiliated candidates obtain access to the ballot by nominating petition.

C. There Is No Conflict Concerning The Due Process Clause

The Petitioners claim that by affirmatively regulating how much of a fee a party may assess of an aspiring nominee, the State has impermissibly delegated legislative authority to a private party. As the Third Circuit noted, the Petitioners cited no federal appellate authority that deemed a state delegation unconstitutional under the Due Process Clause for any reason except where there is a lack of standards (not the case here) which allows the private party to exercise authority "on a whim or caprice." *Biener v. Calio*, 361 F. 3d 206, 217 (3d. Cir. 2004). There is, therefore, no conflict among the circuits with respect to Due Process.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

CHARLES J. DURANTE *
CONNOLLY BOVE LODGE
& HUTZ LLP
P.O. Box 2207
Wilmington, Delaware 19899
(302) 658-9141

* Counsel of Record

Attorney for Respondent
Democratic Party of the
State of Delaware